

109TH CONGRESS
2D SESSION

S. 3823

To amend the Americans with Disabilities Act of 1990 and the Age Discrimination in Employment Act of 1967 to provide a means to combat discrimination on the basis of age or disability, by conditioning a State's receipt or use of Federal financial assistance on the State's waiver of immunity from suit for violations under such Acts.

IN THE SENATE OF THE UNITED STATES

AUGUST 3, 2006

Mr. DEWINE introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Americans with Disabilities Act of 1990 and the Age Discrimination in Employment Act of 1967 to provide a means to combat discrimination on the basis of age or disability, by conditioning a State's receipt or use of Federal financial assistance on the State's waiver of immunity from suit for violations under such Acts.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Civil Rights Restora-
5 tion Act of 2006”.

1 **SEC. 2. FINDINGS.**

2 Congress finds the following:

3 (1) For over 30 years, Congress has outlawed
4 employment discrimination by State employers. In
5 1974, in the face of pervasive age discrimination by
6 State and other employers, Congress amended the
7 Age Discrimination in Employment Act of 1967 (29
8 U.S.C. 621 et seq.) (referred to in this Act as the
9 “ADEA”) to outlaw age discrimination by such em-
10 ployers. In 1990, Congress passed the Americans
11 with Disabilities Act of 1990 (42 U.S.C. 12101 et
12 seq.) (referred to in this Act as the “ADA”) to pro-
13 vide a “clear and comprehensive national mandate”,
14 as described in section 2(b)(1) of that Act (42
15 U.S.C. 12101(b)(1)), to eliminate discrimination
16 against individuals with disabilities, even when that
17 discrimination came at the hands of States, includ-
18 ing State employers.

19 (2)(A) Many years have passed since the enact-
20 ment of those laws, but discrimination on the basis
21 of age or disability remains a serious problem in the
22 United States.

23 (B) Discrimination has invidious effects on its
24 victims, the workforce, the economy as a whole, and
25 government revenues. Discrimination on the basis of
26 age or disability—

1 (i) increases the risk of unemployment
2 among older workers or individuals with disabili-
3 ties, who may, as a result of the discrimina-
4 tion, be forced to depend on government pro-
5 grams;

6 (ii) adversely affects the morale and pro-
7 ductivity of the workforce;

8 (iii) perpetuates unwarranted stereotypes
9 about the abilities of older workers or individ-
10 uals with disabilities, thus reducing the effec-
11 tiveness of government programs promoting
12 nondiscrimination and integration; and

13 (iv) prevents the best use of both public
14 and private resources.

15 (3) Since the passage of the ADA and the
16 ADEA, private civil suits by the victims of discrimi-
17 nation have been an essential tool in combating ille-
18 gal discrimination. As one witness explained during
19 hearings on the legislation that became the ADA,
20 “civil rights laws depend heavily on private enforce-
21 ment”. “[D]amages are essential to provide private
22 citizens a meaningful opportunity to vindicate their
23 rights. Attempts to weaken the remedies available
24 under the ADA are attacks on the ADA itself, and
25 their success would make the ADA an empty prom-

1 ise of equality.”. Field Hearing on Americans with
2 Disabilities Act, Before the Subcommittee on Select
3 Education of the House Committee on Education
4 and Labor, 101st Cong. 68 (1989) (statement of
5 Mr. Howard Wolf).

6 (4) In recent years, however, the Supreme
7 Court has created a serious loophole in the ADA and
8 the ADEA, weakening their “promise of equality”.
9 In *Kimel v. Florida Board of Regents*, 528 U.S. 62
10 (2000), for instance, the Supreme Court held that
11 Congress lacked the power to subject States to suit
12 for money damages under the ADEA. In *Board of*
13 *Trustees of the University of Alabama v. Garrett*,
14 531 U.S. 356 (2001), the Court again held that
15 Congress lacked the power to subject States to suit
16 for money damages, this time under title I of the
17 ADA (42 U.S.C. 12111 et seq.).

18 (5) As a result of those decisions, State employ-
19 ees who are victimized by discrimination on the basis
20 of age or disability cannot sue in Federal court for
21 money damages to vindicate their Federal rights.
22 Those decisions have, in turn, had 2 unfortunate
23 consequences.

24 (6) First, they have undermined the enforce-
25 ment of the ADA and the ADEA. Lawsuits for

1 money damages are the primary means for private
2 individuals to obtain redress for discrimination. In
3 addition, lawsuits for money damages promote deter-
4 rence and provide an important way for the Federal
5 Government to enforce antidiscrimination laws. By
6 eliminating the ability for State employees to sue
7 their employers for such damages, the Supreme
8 Court's Kimel and Garrett decisions have made en-
9 forcement of these civil rights laws more difficult.

10 (7) Second, they have created a legal regime
11 that gives State employees fewer rights than other
12 employees covered by the ADA and the ADEA. At
13 present, employees of local governments and employ-
14 ees in the private sector are entitled to sue in Fed-
15 eral court for money damages for violations of the
16 ADA or the ADEA. For the more than 2,500,000
17 individuals who work for the States, however, such
18 relief is no longer available.

19 (8) Although most States have laws in effect
20 that bar discrimination on the basis of age or dis-
21 ability, those laws are insufficient to provide redress
22 for those individuals who are subjected to discrimi-
23 nation by State employers or agencies.

24 (9) A few States apply the doctrine of sovereign
25 immunity to completely bar State employees from

1 suing in State court for age discrimination. In sev-
2 eral States, it is still unclear whether State law
3 claims can proceed in State court for age discrimina-
4 tion or whether those claims are barred by sovereign
5 immunity. Finally, there are many States that se-
6 verely limit or restrict the kinds of remedies or mon-
7 etary relief available to State employees who bring
8 suits for discrimination on the basis of age.

9 (10) The same problems exist with State laws
10 regarding disability discrimination. In fact, one re-
11 cent analysis has shown that there are significant
12 gaps in the coverage and remedies available under
13 State laws outlawing discrimination.

14 (11) Thus, while State laws are important in
15 trying to stem discrimination on the basis of age or
16 disability, they are currently inadequate to close the
17 loophole created by the Kimel and Garrett decisions.

18 (12) In the years since the Kimel and Garrett
19 decisions, many States have also challenged the con-
20 stitutionality of title II of the ADA (42 U.S.C.
21 12131 et seq.). These challenges have forced individ-
22 uals with disabilities into extensive litigation about
23 sovereign immunity when they seek redress for dis-
24 ability discrimination in such fundamental areas as
25 access to the courts, access to community-based

1 services, access to State-sponsored health insurance,
2 access to public transportation, access to handi-
3 capped parking, access to mental health services,
4 and access to public education. The Supreme Court
5 has issued several decisions that invite even more
6 litigation. In *Tennessee v. Lane*, for instance, the
7 Court held that, under the particular facts of that
8 case, a plaintiff could sue the State for money dam-
9 ages under title II of the ADA, even though the
10 Court, in the *Garrett* case, had barred a claim for
11 such damages under title I of that Act (42 U.S.C.
12 12111 et seq.) *Tennessee v. Lane*, 541 U.S. 509
13 (2004).

14 (13) After the *Lane* decision, some claims
15 against States are permitted to proceed under the
16 ADA, while others are not. This has made it ex-
17 tremely difficult for the victims of discrimination,
18 States, and Congress to determine precisely when
19 States are subject to suit under the ADA and when
20 they are not. The confusion has spawned a signifi-
21 cant amount of litigation in the lower Federal
22 courts. This jurisprudence has even caused the
23 Chairman of the Committee on the Judiciary of the
24 Senate, Senator Arlen Specter, to condemn the
25 Court's recent decisions as "inexplicable".

1 (14) The Constitution provides Congress with
2 the power to enact legislation—

3 (A) to clarify that, despite the Supreme
4 Court’s decisions in the Kimel and Garrett
5 cases, the States are subject to suit just like
6 other entities when the States violate the ADA
7 and the ADEA; and

8 (B) to end the confusion created by the
9 Court’s decision in the Lane case.

10 (15) Under section 8 of article I of the Con-
11 stitution, “The Congress shall have power to lay and
12 collect taxes, duties, imposts and excises, to pay the
13 debts and provide for the common defense and gen-
14 eral welfare of the United States”.

15 (16) Congress’ power under this language,
16 known as the Spending Clause, is well-established.
17 Under this Clause, Congress has the power to re-
18 quire the States to abide by certain conditions in ex-
19 change for receiving Federal financial assistance.
20 This authority has been recognized by the Supreme
21 Court repeatedly through the years and reaffirmed
22 recently. *United States v. Butler*, 297 U.S. 1 (1936)
23 (declaring that Congress may exert authority
24 through its spending power); *South Dakota v. Dole*,
25 483 U.S. 203 (1987) (upholding condition requiring

1 the establishment of a drinking age of 21 years in
2 exchange for the receipt of Federal highway dollars).
3 In fact, the Supreme Court has specifically held that
4 Congress may require a State, as a condition of re-
5 ceiving Federal financial assistance, to waive its im-
6 munity from suit for violations of Federal law. Col-
7 lege Savings Bank v. Florida Prepaid Postsecondary
8 Education Expense Board, 527 U.S. 666 (1999).

9 (17) Congress has previously used its spending
10 power to require States to waive their immunity
11 from suit in exchange for receiving Federal financial
12 assistance. For instance, the provisions of section
13 1003 of the Rehabilitation Act Amendments of 1986
14 (42 U.S.C. 2000d–7) provide that a State shall not
15 be immune from suit under the 11th amendment for
16 violations of section 504 of the Rehabilitation Act of
17 1973 (29 U.S.C. 794), title IX of the Education
18 Amendments of 1972 (20 U.S.C. 1681 et seq.), the
19 Age Discrimination Act of 1975 (42 U.S.C. 6101 et
20 seq.), and title VI of the Civil Rights Act of 1964
21 (42 U.S.C. 2000d et seq.). At least one court, how-
22 ever, has suggested that those provisions do not
23 apply to the ADA or the ADEA. *Brown v. Wash-*
24 *ington Metro Area Transit Authority*, No. DKC

1 2005–0052, 2005 U.S. Dist. LEXIS 16881 (D. Md.
2 2005).

3 (18) By requiring States to waive their immu-
4 nity from suit under the ADA and the ADEA in ex-
5 change for receiving Federal assistance, the Federal
6 government can ensure that Federal dollars are not
7 “frittered away” on unlawful discrimination. Such a
8 conditional waiver will help Congress “protect the in-
9 tegrity of the vast sums of money distributed
10 through Federal programs”. *Sabri v. United States*,
11 541 U.S. 600 (2004). “Simple justice requires that
12 public funds, to which all taxpayers . . . contribute,
13 not be spent in any fashion which encourages, en-
14 trenches, subsidizes, or results in . . . discrimina-
15 tion”. *Lau v. Nichols*, 414 U.S. 563 (1974). This
16 simple principle applies whether the discrimination is
17 based on race, as in the *Lau* case, or age, or dis-
18 ability, as in *Barbour v. Washington Metro Area*
19 *Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004).

20 (19) Such a conditional waiver does not coerce
21 a State in any way. The Supreme Court has recog-
22 nized that a State’s voluntary waiver of its 11th
23 amendment right is constitutional. *College Savings*
24 *Bank v. Florida Prepaid Postsecondary Education*
25 *Expense Board*, 527 U.S. 666 (1999) (citing *Clark*

1 v. Barnard, 108 U.S. 436 (1883)). The Court has
2 explicitly recognized that a State's acceptance of
3 Federal funds constitutes a knowing agreement to a
4 congressionally-imposed condition on the funds.
5 Thus, while Congress may not compel States to
6 waive their immunity granted under the 11th
7 amendment, a voluntary State waiver condition is
8 wholly permissible. *Alden v. Maine*, 527 U.S. 706
9 (1999).

10 (20) The *Kimel* and *Garrett* decisions frustrate
11 the ability of the ADA and the ADEA to protect in-
12 dividual rights and remedy violations of Federal law.
13 In the wake of those decisions, and in recognition
14 that State laws may be insufficient to protect
15 against discrimination on the basis of age or dis-
16 ability, it is essential to require that States waive
17 their immunity from suit under the ADA and the
18 ADEA for those programs or activities receiving
19 Federal financial assistance.

20 **SEC. 3. PURPOSES.**

21 The purposes of this Act are—

22 (1) to provide to any State employee or person
23 aggrieved by any program or activity that receives
24 Federal financial assistance the right to sue the

1 State for money damages for any violation of the
2 ADA or the ADEA; and

3 (2) to provide that a State's receipt or use of
4 Federal financial assistance for any program or ac-
5 tivity of a State shall constitute a waiver of sov-
6 ereign immunity, under the 11th amendment to the
7 Constitution or otherwise, to a suit brought by any
8 employee or person aggrieved by that program or ac-
9 tivity for any violation of the ADA or the ADEA.

10 **SEC. 4. ABROGATION OF STATE SOVEREIGN IMMUNITY.**

11 (a) AGE DISCRIMINATION IN EMPLOYMENT ACT OF
12 1967.—Section 7 of the Age Discrimination in Employ-
13 ment Act of 1967 (29 U.S.C. 626) is amended by adding
14 at the end the following:

15 “(g) WAIVER OF SOVEREIGN IMMUNITY.—

16 “(1) WAIVER.—A State's receipt or use of Fed-
17 eral financial assistance for any program or activity
18 of a State shall constitute a waiver of sovereign im-
19 munity, under the 11th amendment to the Constitu-
20 tion or otherwise, to a suit brought by any employee
21 or person aggrieved by that program or activity for
22 equitable, legal, or other relief authorized by or
23 through this Act.

24 “(2) ABROGATION FOR CONSTITUTIONAL VIOLA-
25 TION.—In addition to the abrogation of sovereign

1 immunity already accomplished by this Act, a
 2 State’s sovereign immunity, under the 11th amend-
 3 ment to the Constitution or otherwise, is abrogated
 4 for any suit brought by any employee or person for
 5 equitable, legal, or other relief authorized by or
 6 through this Act, for conduct that violates the 14th
 7 amendment (including the constitutional rights in-
 8 corporated in the 14th amendment) and that also
 9 violates this Act.

10 “(3) DEFINITIONS.—In this subsection:

11 “(A) PROGRAM OR ACTIVITY.—

12 “(i) IN GENERAL.—The term ‘pro-
 13 gram or activity’ has the meaning given
 14 the term in section 309 of the Age Dis-
 15 crimination Act of 1975 (42 U.S.C. 6107).

16 “(ii) OPERATIONS INCLUDED.—The
 17 term includes any operation carried out,
 18 funded, or arranged by an entity described
 19 in clause (i) or (ii) of section 309(4)(A) of
 20 such Act (42 U.S.C. 6107(4)(A)) that re-
 21 ceives Federal financial assistance, even if
 22 the entity does not use the Federal finan-
 23 cial assistance for the operation.

24 “(B) RECIPIENT.—A State shall be consid-
 25 ered to receive Federal financial assistance for

1 a program or activity if the program or activ-
 2 ity—

3 “(i) receives the assistance from an
 4 intermediary; and

5 “(ii) is the intended recipient under
 6 the statutory provision through which the
 7 intermediary receives the assistance.

8 “(C) CONSTRUCTION.—Nothing in this
 9 paragraph shall be construed to suggest that,
 10 for purposes of this subsection or title III of
 11 such Act—

12 “(i) the term ‘program or activity’
 13 would not include the operation described
 14 in subparagraph (A)(ii), in the absence of
 15 this paragraph; or

16 “(ii) a State described in subpara-
 17 graph (B) would not be considered to re-
 18 ceive Federal financial assistance for a
 19 program or activity, in the absence of this
 20 paragraph.”.

21 (b) TITLE I OF THE AMERICANS WITH DISABILITIES
 22 ACT OF 1990.—Section 107 of the Americans with Dis-
 23 abilities Act of 1990 (42 U.S.C. 12117) is amended by
 24 adding at the end the following:

25 “(c) WAIVER OF SOVEREIGN IMMUNITY.—

1 “(1) WAIVER.—A State’s receipt or use of Fed-
2 eral financial assistance for any program or activity
3 of a State shall constitute a waiver of sovereign im-
4 munity, under the 11th amendment to the Constitu-
5 tion or otherwise, to a suit brought by any employee
6 or person alleging a violation of this title (including
7 regulations promulgated under section 106) or sec-
8 tion 503, or otherwise aggrieved, by that program or
9 activity for equitable, legal, or other relief authorized
10 by or through this Act or section 1977A of the Re-
11 vised Statutes (42 U.S.C. 1981a).

12 “(2) ABROGATION FOR CONSTITUTIONAL VIOLA-
13 TION.—In addition to the abrogation of sovereign
14 immunity already accomplished by section 502, a
15 State’s sovereign immunity, under the 11th amend-
16 ment to the Constitution or otherwise, is abrogated
17 for any suit brought by any employee or person for
18 equitable, legal, or other relief authorized by or
19 through this Act or section 1977A of the Revised
20 Statutes (42 U.S.C. 1981a), for conduct that vio-
21 lates the 14th amendment (including the constitu-
22 tional rights incorporated in the 14th amendment)
23 and that also violates this title (including regulations
24 promulgated under section 106) or section 503.

25 “(3) DEFINITIONS.—In this subsection:

1 “(A) PROGRAM OR ACTIVITY.—

2 “(i) IN GENERAL.—The term ‘pro-
3 gram or activity’ has the meaning given
4 the term in section 504(b) of the Rehabili-
5 tation Act of 1973 (29 U.S.C. 794(b)).

6 “(ii) OPERATIONS INCLUDED.—The
7 term includes any operation carried out,
8 funded, or arranged by an entity described
9 in subparagraph (A) or (B) of section
10 504(b)(1) of such Act (29 U.S.C.
11 794(b)(1)) that receives Federal financial
12 assistance, even if the entity does not use
13 the Federal financial assistance for the op-
14 eration.

15 “(B) RECIPIENT.—A State shall be consid-
16 ered to receive Federal financial assistance for
17 a program or activity if the program or activ-
18 ity—

19 “(i) receives the assistance from an
20 intermediary; and

21 “(ii) is the intended recipient under
22 the statutory provision through which the
23 intermediary receives the assistance.

24 “(C) CONSTRUCTION.—Nothing in this
25 paragraph shall be construed to suggest that,

1 for purposes of this subsection or such section
 2 504—

3 “(i) the term ‘program or activity’
 4 would not include the operation described
 5 in subparagraph (A)(ii), in the absence of
 6 this paragraph; or

7 “(ii) a State described in subpara-
 8 graph (B) would not be considered to re-
 9 ceive Federal financial assistance for a
 10 program or activity, in the absence of this
 11 paragraph.”.

12 (c) TITLE II OF THE AMERICANS WITH DISABIL-
 13 ITIES ACT OF 1990.—Section 203 of the Americans with
 14 Disabilities Act of 1990 (42 U.S.C. 12133) is amended—

15 (1) by inserting “(a) IN GENERAL.—” before
 16 “The”; and

17 (2) by adding at the end the following:

18 “(b) WAIVER OF SOVEREIGN IMMUNITY.—

19 “(1) WAIVER.—A State’s receipt or use of Fed-
 20 eral financial assistance for any program or activity
 21 of a State shall constitute a waiver of sovereign im-
 22 munity, under the 11th amendment to the Constitu-
 23 tion or otherwise, to a suit brought by any employee
 24 or person alleging a violation of this title (including
 25 regulations promulgated under section 204, 229, or

244) or section 503, or otherwise aggrieved, by that program or activity for equitable, legal, or other relief authorized by or through this Act.

“(2) ABROGATION FOR CONSTITUTIONAL VIOLATION.—In addition to the abrogation of sovereign immunity already accomplished by section 502, a State’s sovereign immunity, under the 11th amendment to the Constitution or otherwise, is abrogated for any suit brought by any employee or person for equitable, legal, or other relief authorized by or through this Act, for conduct that violates the 14th amendment (including the constitutional rights incorporated in the 14th amendment) and that also violates this title (including regulations promulgated under section 204, 229, or 244) or section 503.

“(3) DEFINITIONS.—In this subsection:

“(A) PROGRAM OR ACTIVITY.—

“(i) IN GENERAL.—The term ‘program or activity’ has the meaning given the term in section 504(b) of the Rehabilitation Act of 1973 (29 U.S.C. 794(b)).

“(ii) OPERATIONS INCLUDED.—The term includes any operation carried out, funded, or arranged by an entity described in subparagraph (A) or (B) of section

1 504(b)(1) of such Act (29 U.S.C.
 2 794(b)(1)) that receives Federal financial
 3 assistance, even if the entity does not use
 4 the Federal financial assistance for the op-
 5 eration.

6 “(B) RECIPIENT.—A State shall be consid-
 7 ered to receive Federal financial assistance for
 8 a program or activity if the program or activ-
 9 ity—

10 “(i) receives the assistance from an
 11 intermediary; and

12 “(ii) is the intended recipient under
 13 the statutory provision through which the
 14 intermediary receives the assistance.

15 “(C) CONSTRUCTION.—Nothing in this
 16 paragraph shall be construed to suggest that,
 17 for purposes of this subsection or such section
 18 504—

19 “(i) the term ‘program or activity’
 20 would not include the operation described
 21 in subparagraph (A)(ii), in the absence of
 22 this paragraph; or

23 “(ii) a State described in subpara-
 24 graph (B) would not be considered to re-
 25 ceive Federal financial assistance for a

1 program or activity, in the absence of this
2 paragraph.”.

3 **SEC. 5. EFFECTIVE DATE.**

4 (a) AGE DISCRIMINATION IN EMPLOYMENT ACT OF
5 1967.—

6 (1) IN GENERAL.—With respect to a particular
7 program or activity, paragraphs (1) and (3) of sec-
8 tion 7(g) of the Age Discrimination in Employment
9 Act of 1967 (29 U.S.C. 626(g)) apply to conduct oc-
10 curring on or after the day, after the date of enact-
11 ment of this Act, on which a State first receives or
12 uses Federal financial assistance for that program
13 or activity. Section 7(g)(2) of the Age Discrimina-
14 tion in Employment Act of 1967 (29 U.S.C.
15 626(g)(2)) applies to all civil actions pending on that
16 date of enactment or filed thereafter.

17 (2) PROGRAM OR ACTIVITY; RECEIVES FEDERAL
18 FINANCIAL ASSISTANCE.—The definition and rule
19 specified in subparagraphs (A) and (B) of section
20 7(g)(3) of such Act (29 U.S.C. 626(g)(2)) shall
21 apply for purposes of this subsection.

22 (b) AMERICANS WITH DISABILITIES ACT OF 1990.—

23 (1) IN GENERAL.—With respect to a particular
24 program or activity, paragraphs (1) and (3) of sec-
25 tion 107(c) and paragraphs (1) and (3) of section

1 203(b) of the Americans with Disabilities Act of
2 1990 (42 U.S.C. 12117(c), 12133(b)) apply to con-
3 duct occurring on or after the day, after the date of
4 enactment of this Act, on which a State first re-
5 ceives or uses Federal financial assistance for that
6 program or activity. Sections 107(c)(2) and
7 203(b)(2) of the Americans with Disabilities Act of
8 1990 (42 U.S.C. 12117(c)(2), 12133(b)(2)) apply to
9 all civil actions pending on that date of enactment
10 or filed thereafter.

11 (2) PROGRAM OR ACTIVITY; RECEIVES FEDERAL
12 FINANCIAL ASSISTANCE.—The definition and rule
13 specified in subparagraphs (A) and (B) of section
14 107(c)(3) of such Act (42 U.S.C. 12117(c)(3)) shall
15 apply for purposes of this subsection.

○